SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1898.

J. FRANCISCO CHAVEZ, *Appellant*,
vs.
UNITED STATES. } No. 88.

STATEMENT OF CASE.

The appellant filed his petition in the Court of Private Land Claims in 1892 asking for the confirmation of his claim for a grant of land situate in Valencia County, New Mexico, east of the Manzano Mountains and near the confirmed grant of the town of Torreon, containing about 5,000 acres. The record shows that Nerio Antonio Montoya addressed a petition to the ayuntamiento of the town of Tome asking that body to recommend to the territorial deputation that he be given the land in question; on the 19th of March, 1831, the ayuntamiento recom-

mended to the deputation that the donation of the land prayed for should be made; on the 12th day of November, 1831, the territorial deputation, with the consent and participation of the acting governor and political chief of the territory, who presided over its deliberations, granted the land prayed for, and directed the alcalde of the proper jurisdiction to execute the proper document to secure to the grantee the land granted. It further appears that, on the 7th of December, 1831, the alcalde of the jurisdiction of Tome executed a document showing the presentation to the ayuntamiento of the order of the deputation, and expressing his readiness to put the grantee in possession as soon as he might be notified to do so, and on the 12th of December, 1831, the alcalde delivered possession of the land and executed a formal act of juridical possession.

On the 22nd of December, 1831, the governor and political chief of New Mexico wrote a letter to the alcalde in answer to a communication from him in which he informed the governor of his having executed the decree of the deputation and inquired as to how much his fees should be. A translation of this letter will be found on page 9 of the printed record.

Upon the evidence submitted, no question can be made as to the grantee having gone into possession and so remaining until he turned the property over to the father of petitioner on account of a debt due to petitioner's grandfather, or as to petitioner having succeeded by various mesne conveyances to all of the rights of the original grantee.

No question is made as to the genuineness of any of the documents submitted or the facts as stated. The only question before this court for consideration is as to whether a grant made by order of the territorial deputation of New Mexico in 1832, with the par-

ticipation of the political chief, conveyed any title to the grantee.

By reference to the opinion of the Court of Private Land Claims, which appears on page 40 of the printed record, it will be seen that the claim was rejected solely on the ground that the departmental assembly or territorial deputation had no power or authority to make a grant of lands at the time this grant was made, and that the fact that the governor may have presided at the meeting at the time the action was taken makes no difference, as the power to make the grant was exclusively in the governor.

It is evident that this opinion is based upon the supposed authority of *United States vs. Vigil, 13 Wallace, 449.* The appellant claims that the question of lack of power in the territorial deputation was not necessary to the decision of the case of *United States vs. Vigil* and that such expressions as are used in that case with regard to this question do not constitute a precedent binding on the court in the present case, where the only possible point of dispute is as to the power of the deputation.

The appellant has made the following

ASSIGNMENT OF ERRORS.

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Now comes the said appellant by his solicitor and says to the court here that there is manifest error in the record and decree of this cause, and he specifies the following as errors herein:

1. The court below erred in holding that the claim of petitioner was not entitled to confirmation.

2. The court below erred in holding that the title asserted by appellant to the tract of land known as the Nerio Antonio Montoya grant was of no validity.

3. The court below erred in holding that the said Nerio Antonio Montoya grant was not such as the United States are bound to recognize and confirm under the treaties of cession by Mexico to the United States.

4. The court below erred in rejecting the said claim to the said tract of land and in dismissing the petition of appellant.

5. The court below erred in holding that the territorial deputation had no power or authority to make a grant of lands at the time the said grant was made.

6. The court below erred in holding that the power to make the grant was exclusively in the governor.

Wherefore appellant prays that the decree of the court below be reversed, vacated and set aside and that a decree of confirmation of his claim be entered in this court, or that such other order and decree be made as to this court shall seem proper.

F. W. CLANCY,

Solicitor for Appellant.

POINTS AND AUTHORITIES.

I.

The territorial deputation had lawful power and authority to make the grant to Montoya.

It is obvious that this proposition is essential to the validity of appellant's claim, and in order to establish it he must necessarily discuss the effect of the decision of this court in the case of *United States vs. Vigil.*

It is here suggested that the decision of the question as to the power of the departmental assembly was not absolutely necessary to the rejection of the claim in the Vigil case. The court declares that the grant in that case was invalid because it violated the fundamental rule on which the right of donation was placed by law, "the essential element of colonization" being absent, and the number of acres granted being "enormously in excess of the maximum quantity grantable under the law."

The argument by which in the present case it is sought to uphold the claim of appellant is that the regulations of 1828 which provided that the governor should exercise the power to grant lands, are mere executive regulations created by the act of the President of the Republic and are not to be regarded like the provisions of the colonization law of 1824, which was the act of the Congress itself and against which no presumption can be entertained in favor of the validity of acts in contravention of its provisions; that, being mere regulations of this character, when we find official acts not in accordance therewith, there is room for the application of the well-established doctrine of presumption in favor of the regularity and validity of such acts; and, that, in New Mexico, not only in this particular case, but in nearly all other cases of grants of land between 1828 and 1846, the uniform course of proceeding was like that in the present case, the grants being made by the deputation or assembly of New Mexico. The exceptions are to be found in the acts of Governor Manuel Armijo, who made a number of grants during the latter part of his

career without the slightest regard to the restrictions of the law of 1824 and without any attention to the requirements of the regulations of 1828. His conduct was so much beyond the limitations imposed by law that in at least two cases surveyors-general of New Mexico, in reporting favorably upon his grants, declare that he was posessed of extraordinary and unlimited powers.

Vigil and St. Vrain grant, Report 457, H. R. 35th Cong, 1st. Sess.,p. 278.

Nolan grant, Ex. Doc. No. 28, H. R. 36th Cong., 2nd Sess., p. 18.

"Where the act done is contrary to the written order of the King, produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein, and according to some order known to the King and his officers, though not to his subjects (*7 Peters 96; 8 Peters, 447, 451, 454, 456*) and courts ought to require very full proof that he has transcended his powers before they so determine it. (*8 Pet., 464; 9 Pet., 734*).

Strother vs. Lucas, 12 Pet, 438,

See also

U. S. vs. Percheman, 7 Pet., 95.

Delassus vs. U. S., 9 Pet., 134.

U. S. vs. Clark, 8 Pet., 451.

There is certainly something analogous to the written order of the King in the executive regulations in 1828 The law of 1824 had committed the subject of making such regulations to the executive department, and there was no reason why such regulations might not be changed, modified or superseded by others at the will of the executive. When we find that for

nearly eighteen years and under not less than thirteen different governors, the almost uniform course of proceeding was not in accordance with those regulations, certainly the doctrine of this court, announced in the case of *Strother vs. Lucas* should be held to apply, and it should be presumed the acts were done in accordance to some order known to the President and his subordinates though not to other citizens.

That this statement of the condition of things in New Mexico is correct is something of which this court can properly take judicial notice. It is a historical fact, affecting the people of a very large portion of our country, and not one as to which evidence should be required. To have put in evidence in the present case the archives and records of the Mexican government so far as they have been preserved in New Mexico, for the purpose of showing what is here asserted, would impose a grievous burden on the claimant and one that is totally unnecessary. It is proposed in this brief to set out a summary of a portion of those archives and records in order to inform the court as to the conditions prevailing in New Mexico during the period specified, and it is anticipated that the learned special counsel for the government will concede, or, at least, not dispute, the correctness of the statements.

No such attempt as this would be made if it appeared that these conditions had ever before been brought to the attention of this court The present case does not involve a large amount of land, but the questions raised upon this appeal are of importance, not only to the appellant in this case, but to claimants in a number of other cases.

The following are summaries of the contents of archives and records to be found in the office of the

Surveyor-General at Santa Fe, New Mexico, and are submitted for the information of the court:

Archive 812, dated November 8, 1830, is the report of a committee of the most excellent deputation on the petition of Jose Guadalupe Romero and Manuel Bustamente asking for the *sitio* of La Gotera, at Galisteo. From the report it appears that the land had been previously given to other persons by a former deputation, and the report then declares that "no queda duda de que estubo en las atribuciones de la Exma Diputacion donar el precitado terreno a los qe actualmente lo poseen, y por lo mismo no es de los deveres de la actual entremeterse en la que el anterior hizo devidamente." This may be translated that "there is no doubt that it was within the powers of the most excellent deputation to donate the said land to those who now hold it, and therefore it is not among the duties of the present deputation to interfere with what the former deputation properly did."

Archive 901, dated April 9, 1845, is the petition of Pedro Alcantar Vigil, for himself and others, asking for land between Las Vegas and Mora, and is addressed to the governor. Then follows a reference of the petition by the departmental assembly to the prefects of the first and second districts for reports, which is signed Felipe Sena, Presidte., and Tomas Ortiz, Srio. After this appears the following: "Cumplase con el anterior decreto de la E. Asamblea. Martinez;" which is, in effect, "Let the foregoing decree of the excellent assembly be complied with. Martinez."

Martinez was the governor. Then follow several reports from different officials as to the propriety of granting the petition, and

finally a report of the committee of the Assembly, dated June 27, 1845, recommending the grant of land on certain conditions, and after that report appears the following:

"Queda aprobado en todos sus partes el "precente dictamen.

"Sala de Seciones de la Exma Asamblea, Junio 27 de 1845.

"Jose Chavez, Tomas Ortiz."

The substance of this is that "the present report remains in all parts approved."

After this, under date of July 2, 1845, appears the formal order or decree of the Assembly in accordance with the recommendation of the committee.

Archive 918 contains reports of committees and the decree of the Assembly upon a petition for lands at Sapello, as follows:

First, a letter from a committee, dated December 23, 1844, signed Jose Chavez and Santiago Martinez, asking the Secretary of the government, Bernardo V. Franco, for a copy of the decree of the Supreme Government forbidding foreigners to acquire lands. This begins by describing the committee as appointed this day by the "Most Excellent Senor Governor as President of the honorable Assembly."

Second, a very long report, dated January 2, 1845, signed the same as the letter, reviewing the subject at great length and recommending that the land called Sapello should not be conceded to the foreigners unless they could show express license from the Supreme Government, and that the Mexicans should not have the land until they might ask it in conformity with the laws of the nation.

Third, under date of January 3, 1845, is a letter from the Assembly to the Governor, announcing that it had decided the matter on January 2, 1845, in accordance with the report of the committee, and returning the original documents to be given to the parties in interest.

Archive 920 is a letter to the Governor from the Departmental Assembly, dated January 27, 1845, in which it is declared that the Assembly had resolved that in no way could the lands of the Sapello be given to the naturalized persons who ask it because that was reserved to the Supreme Government. This copy is signed J. Manuel Gallegos and Tomas Ortiz.

These archives 918 and 920 refer to what is now known as the Scolly grant, which was actually granted by Governor Armijo, March 27, 1843. Possession was not taken under this, and these proceedings were undoubtedly while Armijo was out of office. Having returned to office, he again granted the land, notwithstanding the action of the Assembly, as will appear by reference to Report No. 457, House of Representatives, 35th Congress, 1st Session, at pages 169 and 172.

Archive 921, dated July 27, 1845, contains the petition of John Scolly, for himself and others, addressed to the Governor, reciting former attempts to get land in December of the previous year, and casting injurious reflections on the administration of Martinez, from whom it was impossible to get justice, but, under the truly fraternal government which then existed, he renewed his application for the lands at the Junta de los Rios.

The Governor, on the 7th of August, 1845, put on this petition the following order of reference: "Pase esta instancia al concocimiento de la Exma Asamblea para la resolucion que a bien tenga dictar en el particular." This may be freely translated, "Let this petition be brought to the attention of the most excellent assembly for the determination of what ought to be done about the matter."

Archive 1,103 is a report, dated July 19, 1832, of a committee of the deputation on the petition of Manuel Martinez of Abiquiu and his eight sons and others for land on the Chama river at Tierra Amarilla. The committee recommends the giving of the land asked for under certain conditions subject to the deliberations of the Deputation, and is signed Martinez, Tenorio, and Ortiz.

Archive 1,125 is a "Borrador" of decrees of the Departmental Assembly of New Mexico made in January, February, and March, 1846, and contains four of such decrees:

First, under date of January 10, 1846, a decree granting to Antonio Jose Ribera and Juan Bautista Vigil y Alarid the land necessary at the place known as the Jornada del Muerto in order to open wells and to make a plantation (siembra) and prohibiting the foreigner, Miguel Hauk, from having any part in the concession, because Article 9, of the law of March 11, 1842, prohibited him from acquiring lands without the previous consent of the Supreme Government. This is the grant, the papers relating to which appear at pages 91 to 1 8, of executive document No. 14, House of Representatives, 36th Congress, 1st Session, and is the same claim passed upon in the case of *United States vs. Vigil, 14 Wallace, 449.*

Second, a decree of February 12, 1846, as to the establishment of offices at Taos.

Third, a decree of March 10, 1846, exempting Francisco Ortiz y Delgado for two years from the payment of taxes levied by the ayuntamiento of Santa Fe.

Fourth, a decree of the same date by which it is declared that there is granted to the individuals noted in the list which accompanied the previous presentation, the land which each one needs for planting at the place commonly known as Chaperito, with the addition of half a league *en contorno* which will serve for *egidos* to the settlement, and this concession shall be enjoyed by all other persons who successively may go to join themselves to it. The persons interested in this decree may go to the proper justice of the demarcation that he may make the division of the said lands.

Archive 1,142 is a letter under date of July 7, 1845, from the Departmental Assembly to the Governor, setting out its order of June 2[illegible], 1845, revoking its decree granting a league of land at the Ojo de la Cabra to Juan Otero, because the land belonged to the Indians of Isleta.

Archive 1174 consists of five sheets of four pages each, detached from their context, and are parts of the proceedings of the Departmental Assembly in 1845. It is probable that the remainder of the book to which they belong has been destroyed, or possibly no book being available at the time, the record of proceedings was kept on loose sheets, a portion of which has been lost or destroyed. The folios are numbered 7, 8, 9, 10, 38, 39, 40, 41, 42 and 43.

Attention will be called only to those things which relate to the granting of land.

Folios 7 and 8 contain the record of the discussion on the 23d of January, 1845, of the petition of the naturalized "Escol" and associates, it being finally decided to ask the Governor for information as to the certificates of naturalization which the petitioners ought to have. This clearly is the same matter as that referred to in Archives 918 and 920.

In folio 8, under date of January 28, 1845, the record shows receipt of a communication from the Governor relative to certificates of naturalization of the Sapello petitioners, and further discussion relative to the petition. The President expressed the opinion that it appeared very reasonable to give the land which was asked on account of the great good which would result to the Department, but if this should be done in this way by this "*junta*," it would be an infringement of the laws on the subject, and that it appeared that the concession ought not to be made by this body, because not within its powers, and that the petitioners ought to present themselves to the Supreme Government of the nation, which is the sole depository of such power; and after some discussion the views of the President prevailed and were adopted.

Folio 38 contains an order to send a communication to the Governor asking him to require the return by Juan Otero within eight days of the original documents relating to the petition which he made for the land at the Ojo de la Cabra.

It also contained the appointment of a committee on the application of Pedro Alcantar Vigil. As to this, see archive No. 901.

Folios 40 and 41, under date of June 26, 1845, contain the record of a discussion about Juan Otero and the Ojo de la Cabra, and the decision of the Assembly to require

the return of the documents, and that the prefect Sarracino should be punished for having made false reports.

Folio 42, of the same date, contains proceedings upon the petition for land at Sapello and Manuelitas and reports submitted, and a decree substantially the same as that set out in archive No. 901.

Archive 220 is the report of a committee of the Excellent Deputation, dated November 10, 1830, on the petition of Samuel Chambers, relative to forming a new settlement on the Rio del Ponil. The report recommends a decree setting out that when the territory could have an army sufficient to protect against the incursions of the savages, the petitioner might again present his petition, the Excellent Deputation not consenting to the formation of any new settlement until that time arrives. The report sets out the great danger from making settlements in exposed situations, and cites in corroboration the extermination of the settlement of Lo de Mora and of the settlement of Anton Chico. This is signed Abreu, Quintana and Baca y Campos.

Archive 287 contains the petition of a number of citizens headed by Rafael Fernandez, for the land on the Rio de Picuries. On the margin is written an order of the Excellent Deputation dated March 7, 1829. directing the Ayuntamiento to make report, which is signed Abreu, Secretary.

Archive 396 is a report, dated July 18, 1832, of a committee of the Deputation, recommending that the grant be made of land on the Rio de Picuries. In case No. 65 on the docket of the Court of Private Land Claims is to be found the original act of

juridical possession, which recites that this grant had been made by the Deputation.

Archive 1,300, dated November 9, 1830, appears to be a draft or retained copy of a committee report which, completed and signed, is to be found in Archive 812.

Archive 1,309 is a draft or retained copy of an official letter, unsigned, but evidently from the Governor, addressed to the Alcalde del Bado. It is dated March 24, 1835. Substantially the same letter is to be found at pages 18 and 19, of Ex. Doc. No. 14, House of Representatives, 36th Congress, 1st Session, as a part of the papers relating to the grant of Las Vegas. The completed letter is there to be found signed by the Governor, and is in the same language as this archive, except that the decree of the Deputation is repeated twice over. This archive begins with the words, "En representacion de los vecinos del Bado, Juan de Dios Maese," and continues the same from that point down to the end, and as it appears on page 19 of said executive document, omitting only the words, "Ramon Abreu, Secretario." Attention is called to this archive and the completed letter as showing the distinct assertion by the Territorial Deputation of its power to make the grant and the acquiescence of Governor Sarracino, giving orders, as he does, to the Alcalde to put the grantees in possession. It is to be noted also that the alcalde in giving possession, as appears on page 20 of said Executive Document, professes to act in accordance with the law of colonization relative to concessions of vacant land, also observing scrupulously what was ordered by the Territorial Deputation in its decree of the 23rd of March, 1835, and the order of the political chief Francisco Sarracino.

Archive 142 is a report dated June 15, 1829, made by the Alcalde del Bado to the most Excellent Deputation in obedience to an order of the Deputation made June 4, 1829, and communicated by the Secretary to the Alcalde, as to the petition of Tomas Baca and others for land

Archive 143 is the petition of Tomas Baca and others for lands, presumably the one referred to in Archive 142, addressed to the Ayuntamiento of San Miguel del Vado, and dated April 21, 1829; and following the petition is a reference of it to the Deputation by the ayuntamiento on April 27, 1829.

Archive 219, dated May 2, 1829, is a communication from Ramon Abreu as Secretary of the Territorial Deputation, to the Governor, setting out a copy of the decree of the Deputation on the petition of residents of the Canada for land near Picuries, and after that copy the letter closes with these words: "y para los demas tramites de estilo la comunico a V. S. de orden de S. E."; or in English, "and in order that the further necessary formalities be complied with, I communicate this to your lordship by order of its excellency."

This evidently refers to the same matter as Archive 287.

Archive 255 contains a petition dated April 14, 1831, by Augustin Duran and others to the Excellent Deputation for land between the pueblos of San Domingo and San Felipe. On the margin appear orders of the Deputation signed by Abreu, Secretary, calling for reports from the Ayuntamientos of Cochiti and Sandia. Then follow the reports, one from Cochiti and the other from Sandia.

Archive 269 is a petition dated February 12th, 1839, by Pedro Buen-Amigo Esperanza, a naturalized citizen, addressed to the Deputation, asking for land at a place called Shapellote.

Archive 392, dated June 6, 1829, is the report of a committee of the Excellent Deputation on the petition of the citizen, Miguel Garcia, and the citizens of the United States of North America, Julian Gorden and Jose Manuel Copas, asking to be allowed to colonize the Rio de la Culebra. The report was adverse on the ground that the petition lacked necessary requisites, but the committee did not state what those necessary requisites were. The report made a recommendation that the petition be returned to the political chief in order that it might be made in conformity to law and the general rules of the Supreme Government.

Archive 801 contains a letter dated February 22, 1842, from the Prefect, Juan Andres Archuleta, to the Secretary of the Government, Guadalupe Miranda, stating that he had given and granted a tract of land to sixty individuals on the Rio Colorado near Taos, but that he had received a letter from the Governor, dated September 6th, 1841, directing him to return the petition to the applicants, stating that it was inadmissible; but that he, as Prefect, claimed that the granting of land was one of his powers. Then follows a draft or retained copy of the answer of the Secretary to the Prefect, in which he states that, having reported the matter to the Governor, the latter had instructed him to inform the Prefect that the granting or refusing of lands for colonization was peculiar to the Departmental Assembly, but he directed that the parties in possession might remain subject to the action that might be taken by the Excellent Assembly when it convenes.

Archive 1013, dated November 28th, 1829, is the report of a committee of the Excellent Deputation on the petition of Jose Manuel Trujillo and others, settlers at Manzano, to the number of 67. The report is favorable, with a limit to one league in each direction. This report is signed Sarracino, Baca, Cabeza de Baca.

Archive 1305, dated July 20th, 1833, is a petition to the Territorial Deputation by Mariano Sanchez, asking that the Ojo Sarco be partitioned among twenty-five individuals.

Archive 1322, dated December 22, 1844, is a letter from Governor Mariano Martinez to the President of the Departmental Assembly. The Governor states that he has the honor to transmit the petition which a number of citizens have presented to him relative to the possession of the lands of Sapello and Mora on the Rio Colorado, which has been reported by the Prefectura of this district, and he expresses the hope that the President will be pleased to report the matter to the Most Excellent Assembly.

This is probably the Scolly petition referred to in Archives 918, 920 and 921.

In the journal of the Provincial Deputation which covers the period from 1828 to 1837, on the second page of folio 22, at the session of February 9, 1829, appears the record of the consideration of the petition of Rafael

Sanchez, in union with several other persons, asking lands at San Jose, adjoining the Pueblo of Acoma. It was ordered that the Constitutional Alcalde of Laguna, acting with the Ayuntamiento, should examine if the sitio asked for is free and not acquired by any person, and to examine also if the water which must serve the land asked for is independent from that with which the natives of Laguna and Acoma irrigate, and, there being no obstacle of this nature, to give possession to those who ask the land.

On the first page of folio 67 of the same book, August 4, 1831, is the record of a committee having reported on the petition of Juan Cruz Aragon and Felipe Gonzales as to the foundation of a new settlement on the Rio de los Conejos; and after some discussion the three articles set out in the report were approved, with an additional order that a copy of the report (dictamen) should be sent in order that all the conditions which are set out in it should be carried into effect.

The first signature to this record is Jose Antonio Chavez.

Book of the proceedings of the Provincial Deputation 1828–1837. On the first page of folio 63, under date of April 14, 1831, the record shows that the Deputation ordered that the request of Agn. Duran and twelve others, for land between the Pueblos of Santo Domingo and San Felipe, of about three thousand varas, be referred to the Ayuntamientos of Cochiti and Sandia for reports.

The first signature to the proceedings is Jose Anto. Chavez.

On the second page of folio sixty-eight of the same book, under date of November 11, 1831, the record shows that the Deputation took up the report of the ayuntamiento of El Bado, made in consequence of a petition by persons of that jurisdiction, asking that there be given them for cultivation the land known by the name of El Macho, which report says that there is no obstacle to the donation which is asked; and thereupon the concession was ordered. The first signature to this record is Jose Antonio Chavez

On the first page of folio 74 of the same book, under date of April 28, 1832, appears the record of an order that the President be empowered extraordinarily to settle the matter of the application of the foreigner, Pratt, which was read at the session of the 26th of April. The first signature to this day's record is Santiago Abreu, President.

At the previous session of the 26th of April, on the second page of folio 72, it appears that George Pratt, citizen of the United States, had petitioned for sufficient land for the term of thirty years upon which to establish a saw mill in the Canon at the place called the Corral Viejo, and it was ordered that the ayuntamiento of this city report thereon. The first signature to this day's record is Santiago Abreu, President.

On the second page of folio 76 of the same book, under date of July 18, 1832, the record shows that the Deputation took up the report of the committee on the petition of the Citizen Rafael Gonzales and associates, who asked possession of land for cultivation on the banks of the Rio de Picuries; and the five articles of the report were discussed and afterwards approved.

On the same page and date was taken up the petition of Antonio Sandoval, asking that there be given him for pastures the lands which lie between the Ojo Ediondo as far as the Cañoncito, and reports were ordered from the Constitutional Ayuntamiento of Laguna.

This day's record is signed Santiago Abreu, President.

On the second page of folio 77 of the same book, under date of July 19, 1832, the record shows that there was taken up the report of the committee to which had been referred the petition for lands made by Manuel Martinez and associates, which had been read at the session of the 17th inst., and after discussion the report was approved. This day's record is signed Santiago Abreu, President.

At the previous session of the 17th inst., at folios 75 and 76, there was taken up the petition of Manuel Martinez, asking possession of lands, in union with his eight sons and some other persons of the jurisdiction of Abiquiu, within the limits of the same, which was accompanied by the report of that Ayuntamiento, asked by the Deputation on the 25th of April last and the petition was referred to a committee of Martinez, Tenorio and Ortiz. This day's record is signed Santiago Abreu, President.

On the first page of folio seventy of the same book, under date of April 25th, 1832, record shows that the petition of Manuel Martinez was presented, in which he asks, for pastures and cultivation, a sitio on the banks of the Chama river known by the name of Tierra Amarilla, within the limits expressed in the petition; and it was ordered referred to the Ayuntamiento of Abiquiu for report.

On the first page of folio 70, April 25, 1832, was presented petition of Rafael Fernandez asking in union with twenty-two persons that they be given for cultivation the vacant lands at the Rio de Picuries on the east side. This was discussed and it appearing that the land asked for had been denied by the Deputation to the individuals who now asked it, after a long discussion it was agreed to postpone the subject until the following day.

On the first page of folio 81, March 5, 1833, the deputation took up the petition of Francisco Baca Ortiz, asking possession of land for cultivation near this city, known by the name of the Arco, which was referred to the ayuntamiento for report.

On page two of folio 81, March 5, 1833, report was presented from a committee to which had been referred the expediente of Abiquiu about lands, and, being discussed, it was approved. This day's record is signed Francisco Sarracino.

On the second page of folio 89, March 23, 1835, the record shows that the President presented the petition of residents of the jurisdiction of El Bado, made to that ayuntamiento, asking possession of land in the vacant lands known by the name of Las Vegas, and, being informed by the said ayuntamiento of there being no objection to the donation, and in consequence the formalities of the law being dispensed with, it was ordered that the possession of the land be conceded within the boundaries expressed in the petition, not only to those who petitioned, nor to the residents of El Bado, but generally to all who may not

be provided with land for cultivation, with notice that the grant of these lands is without prejudice to the common pastures and watering places; for all which the political chief will receive petitions which may be made, and will order provision made in conformity herewith.

This day's record is signed Francisco Sarracino.

At folios 95 and 96, January 5, 1836, there was taken up the report of the committee to which had been referred the petition of Francisco Ortiz and Domingo Campos, residents of San Ildefonso, to plant the Valles de Jaramillo de la Cueba. The report is adverse, but by its first article it is decided to give Ortiz one thousand varas square, and by its second article the same amount to Campos.

In the book of proceedings of the Departmental Assembly, Jan. 1 to August 10, 1846, on the second page of folio 36, in the first entry under date of May 1st, 1846, the record shows that the Assembly read the report of a committee appointed to prepare a statement to the Governor, in order that, through him, it should go to the supreme court of justice, relating to the order of the Supreme tribunal, Department of Chihuahua, upon the petition of Senor Juan Otero, relating to the land of Ojo de la Cabra; and said report being approved in full without debate, it was resolved to send a copy to the Governor and to file the original for future use.

The first signature to the proceedings is Ortiz.

In the same book, on page 2 of folio 27, Assembly read petition made by residents of

Nuestra Senora de Guadalupe de la Cuesta, asking lands for farming at Chaperito, which was taken up and, after slight debate, it was resolved unanimously to give to the individuals noted in the petition the lands which each one needs for cultivation, at the place commonly called Chaperito. This is the same decree as the one set out in archive 1125.

In the book of proceedings of the Departmental Assembly of 1845, on page 2 of folio 6, under date of June 17, 1845, the record shows that the Assembly took up the report of el Senor Prefecto, of the Third district, in compliance with the decree of the Assembly of March 27, current year, relative to the request of the Indians of Pueblo de la Isleta, Jesus M. Abeita and Domingo M. Chirina, to the Assembly; the said petition was read and considered and, after long debate, it was resolved to address a communication to his Excellency the Governor, that through him request be sent to Senor Don Juan Otero that he return the originals within eight days, as it was ordered by the Assembly, relative to the petition he presented for the lands of Ojo de la Cabra. Approved.

In the book of proceedings of the Departmental Assembly, January 1 to August 10, 1846, under date of January 10, 1846, on page two of folio five, the petition of Citizens Antonio Jose Rivera, Juan Bautista Vigil y Alarid and the foreigner, Miguel Hauk, asking for lands at the Jornada del Muerto, with object of settling, etc., was read and considered, and, after a long discussion it was ordered that there be granted Citizens Rivera and Vigil land "to open wells, and as much more as they may be able to cultivate, remaining without any right to the pastures" ("para

abrir norias y el mas que puedan cultivar, quedando sin dro alguno a los pastos"), excluding the said Hauk from this concession, the law of March 11, 1842, Art. 9, prohibiting him from acquiring lands in the frontier departments unless with permission of the supreme national government.

First signature to proceedings is Chavez.

In the book of proceedings of the Departmental Assembly for 1845, on the first page of folio 9, under date of June 26, 1845, the record shows there was taken up a communication from the government of the department which accompanies that which the Prefect of the Third district answers, and that which to the prefectura answered Don Juan Otero, relative to the order of this Assembly as to the documents which remain in his possession concerning the concession made him by the Assembly of the land called the Ojo de la Cabra. The record further shows that the subject of the grant to Juan Otero was discussed, and, after a long debate, participated in by a number of members, it was again ordered that Otero return the documents, and, notwithstanding their absence, that the grant be revoked which had been made of the Ojo de la Cabra, and at the same time that the Prefect be reprimanded for the contradictions which appear in his reports, and that this punishment be left to the discretion (*prudencia*) of the Governor.

In the book of proeeedings of the Provincial Deputation, 1828 to 1837, on the second page of folio 31, under date of June 4, 1829, the record shows that the Deputation took up the petition of Tomas Baca and Jose Antonio Cassados for land at a place known by the name of "Pajarito," and the report of the Ayuntamiento; and Mr. Pino said that he knew that the land asked had an owner, and

upon this statement he asked that the Deputation should base its action. Mr. Abreu took the floor, urging that through the Secretary there should be sent to the said Ayuntamiento, by way of its alcalde, notice that discussion had been had upon this, and asking, therefore, for a new report hereon, and upon that which said body gave declaring the land uncultivated and proper to be granted; and it was so ordered. The first signature is Jose Antonio Chaves.

A clear and definite decision as to the power of the territorial deputation was given in 1832 by an officer of the Mexican government whose profession and official position give his opinions great weight. In that year a controversy arose between certain citizens who had been by an alcalde put in possession of lands on the Gallina river, and certain other claimants of those lands. A complete record of the proceedings has been preserved and was filed in the Court of Private Land Claims in the case of *Rio Arriba Land and Cattle Company vs. United States*, which case was afterwards appealed to this court, and the record of the proceedings in 1832 is included in the transcript. The dispute having been brought to the attention of the Governor, he referred the matter to the *asesor general*, who was the licenciate Barreira. That officer required the parties to state their case by means of a set of pleadings, after which he sent his decision to the alcalde in whose court the case was pending, and made use of the following language:

> "The statements of the parties having been examined, the question is made clear, and it appears that the possession given by the alcalde, Jose Maria Ortiz, is of no value because even if he were an authority, he was not competent to give and partition lands, because this is an exclusive attribute of the

territorial deputation."

The alcalde followed the decision of the *asesor* as he was in law bound to do and this adjudication may be considered as made by the highest judicial authority existent in New Mexico at the time.

1 Diccionario de Escriche, Ed. of 1847, 352, title, Asesor.

A number of grants made between 1828 and 1846 have been reported to congress and the reports relative thereto printed as executive documents, and it is deemed advisable to refer to those cases as they appear in those documents instead of resorting to the originals in Santa Fe.

In the report of the Secretary of the Interior for the year 1856, at pages 484 to 493, will be found the record of the Tierra Amarilla grant. In this case Manuel Martinez addressed a petition to the political chief, and this petition was, by the political chief, Santiago Abreu, referred to the territorial deputation. That body called on the ayuntamiento of Abiquiu for a report. That body having reported favorably the deputation granted the land on the 20th of July, 1832. This claim has been confirmed by Congress.

The case of the San Pedro grant appears in report 457, House of Representatives, 35th Congress, first session, beginning at page 210. In that case possession of land was given by a prefect in 1839, but, as we have already seen, prefects had no power to make grants; and in 1845 Jose Serafin Ramirez, who was an officer of the government, having been employed as attorney by the settlers, petitioned the Governor for a revalidation or approval of the grant to be made in conjunction with the departmental assembly. On the 26th of November, 1845, the departmental assembly took up the petition and ordered that it be

returned to the Governor for the purpose which the settlers asked; and, on the 29th of November, the Governor, in this case Armijo himself, made an order approving and revalidating the grant pursuant to the consent given by the assembly. This will appear by reference to pages 215 and 226 of the report aforesaid. This grant has been confirmed by Congress.

In executive document number 14, House of Representatives, 36th Congress, first session, beginning at page 16, will be found the record of the grant of Las Vegas. The record is quite lengthy, but on page 28 will be found a translation of the action of the deputation making the grant and directing that the proceedings be forwarded to the political chief in order that he should execute what had been ordered by the deputation. On page 29 appears the order of the political chief, Francisco Sarracino, dated March 24, 1835, to the alcalde of El Bado, directing him to act in accordance with what had been ordered by the deputation.

In the same executive document, beginning at page 46, will be found the record of the Tajique grant. In this case the grantees petitioned the Governor for a tract of land at Tajique, and the Governor, on the 17th of March, 1834, made an order, which will be found on page 47 of this document, of which the following is a more literal translation than the one which appears at page 49:

"Santa Fe, March 17, 1834.—The constitutional alcalde of Valencia, to whose jurisdiction Tajique belongs, as I am informed, will make the division which is prayed for within the boundaries they ask, provided that no injury therefrom shall result to any third person, it being understood that when the

most excellent deputation reassembles it will confirm the possession, which this government now approves provisionally, in order that the planting time may not be delayed.

Sarracino."

It will be seen that Governor Sarracino did not undertake to make any grant, but only authorized a temporary possession until the matter could be brought before the deputation, which he clearly considered as the sole granting power. This grant has been confirmed by Congress.

In the same document, at page 65, begins the record of the Manzano grant. The settlers of Manzano petitioned the Ayuntamiento of Tome for a grant of the lands which they were then occupying. The Ayuntamiento sent this petition up to the Territorial Deputation with a favorable recommendation; on the 28th of November, 1829, the Territorial Deputation made a favorable decree, and on the 24rh of December the alcalde of Tome delivered possession of the lands. This grant has been confirmed by Congress.

At page 180 of the same document begins the record of the Mora grant. In this case there was no grant produced, but it was claimed that a grant had been made by Governor Perez on the 28th of September, 1835. There are indications in the papers, however, that the grant may have been made by the territorial deputation and an ~~an~~ order given by the Governor for the delivery of possession, as was done in several other cases. This view is strengthened by an examination of a receipt signed by Miguel Mascarenas, which appears on page 186 of the executive document aforesaid, in which the signer acknowledges having received from the former alcalde of the year 1835, a grant composed of four leaves, "which grant Manuel Antonio Sanchez delivered to us accompanied by an order of the political chief, Don Albino

Perez, dated October 10th." This indicates that the grant was one thing and the order of the Governor another. In view of the fact that it would have been a violation of the general custom, it is not likely that the Governor made any grant.

In executive document No. 28, House of Representatives, 36th Congress, 2nd Session, at pages 28 to 37, appears the record of the Canon del Agua grant. This grant was made to Jose Serafin Ramirez, first auditing officer of the departmental assembly and lieutenant of the auxiliary cavalry. He addressed his petition to the Governor and the Governor replied to him that he had laid the matter before the departmental assembly and that body had decreed that he and the other heirs of his grandfather had a right to the mine referred to in his petition, and further decreed that the Governor, in conformity with the colonization laws, should grant the land prayed for; and thereupon the Governor gave him the land and the revalidation of the title to the mine. This was done on the 13th of February, 1844. This grant has been confirmed by Congress.

In miscellaneous document No. 181, 42nd Congress, 2nd Session, at page 50, will be found the record of the Gotera grant. The petition is dated April 14th, 1830, and on the 1st of May of that year it was referred by the territorial deputation to the ayuntamiento of Santa Fe. That body appointed a committee to investigate and report. The committee having reported on the 12th of May, on the 17th of May the report was, by the ayuntamiento, sent to the political chief in order that he could lay it before the territorial deputation as approved by the ayuntamiento. On the 18th of May, as appears by the certificate of the Secretary of the Deputation, that body granted the prayer of the

petitioners, and in order that the recommendations of the ayuntamiento should be carried out, the matter was sent to the first constitutional alcalde, and thereafter possession was duly delivered to the grantees. It should be noticed in this case that the ayuntamiento sent its report to the political chief only for the purpose of being presented to the deputation, and that body took action on the petition.

Executive document number 18, Senate, 50th Congress, first session, contains what is called a supplementary report by Surveyor General Julian, recommending the rejection of the Ojo de la Cabra grant; but it does not appear that his attention had ever been called to the proceedings of the departmental assembly revoking the grant which it had previously made.

In executive document number 93, Senate, 49th Congress, second session, at page 2, will be found a supplementary report by Surveyor General Julian as to the Socorro grant. This grant is said to have been made in December, 1845, by Governor Armijo, but an examination of the order of Armijo will show that the claim made to him was that a grant had previously been made in 1815 or 1816, and his order is rather in the nature of a revalidation or confirmation of the petitioners' claim of having had a grant, rather than the making of a new one. It should be said that the genuineness of this document is disputed by the government.

There is one case which calls for special attention, and that is of the Petaca grant, which will be found at page 3 of executive document 31, Senate, 44th Congress, first

session. At the first glance this will appear to be a grant by Governor Perez in the year 1836, but, upon examination, it will be seen that the recommendation of the ayuntamiento of Ojo Caliente was based upon a former grant, under which there had been no possession for fully twelve years, and was to the effect that the lands should be granted to the new applicants for the reason that the former grantees had forfeited their rights. The Governor's order, based upon the recommendation of the Ayuntamiento, appears to have been for the purpose of substituting new persons under the old grant rather than the making of a new and original grant at that time.

The following grants all appear to have been made by Governor Armijo, and have all been reported to Congress. For some reason there appears to have been considerable diligence in getting many of these Armijo grants before Congress at an early day:

Sangre de Cristo grant, made in 1843, confirmed, nearly 1,000,000 acres.

Ex. Doc. 141, Senate, 47th Cong., 1st Sess., p. 13.

John Scolly grant, made in 1843 and 1846, confirmed.

Report 457, H. R., 35th Cong., 1st Sess., p. 163.

Chilili grant, made in 1841, confirmed.

Report 457, H. R., 35th Cong., 1st Sess., p. 182.

Maxwell grant, made in 1841, confirmed, over 1,700,000 acres.

Report 457, H. R., 35th Cong., 1st Sess., p. 237.

Vigil and St. Vrain grant, made in 1843, confirmed, but cut down to 22 square leagues.

Report 457, H. R., 35th Cong., 1st Sess., p. 269.

Bosque de los Apaches grant, made in 1845, confirmed, over 60,000 acres.

Ex. Doc. No. 14, H. R., 36th Cong., 1st Sess., p. 232.

Nolan grant, made in 1845, over 575,000 acres.

Ex. Doc. No. 28, H. R., 36th Cong., 2nd Sess. p. 2.

Jose Sutton grant, made in 1838, 16 square leagues.

Ex. Doc. No. 112, H. R., 37th Cong., 2nd Sess., p. 4.

Nolan grant, made in 1843, confirmed, but reduced to 11 square leagues.

Ex. Doc. No. 112, H. R., 57th Cong., 2nd Sess , p. 30.

Cebolla grant, made in 1845.

Ex. Doc. No. 296, H. R., 42nd Cong. 2nd Sess., p. 4.

Alamitos grant, made in 1840.

Ex. Doc. No. 37, Senate, 42nd Cong., 3rd Sess., p. 10.

Estancia grant, made in 1845, over 400,000 acres.

Ex. Doc. No. 40, Senate, 42nd Cong., 3rd Sess., p. 3.

Sierra Mosca grant, made in 1846, over 100,000 acres.

Ex. Doc. No. 3, Senate, 43rd Cong. 1st Sess., p 8.

Una de Gato grant, made in 1839.

Ex. Doc. No. 2, Senate, 43d Cong. 2nd Sess., p. 12.

If we exclude from consideration the Petaca grant as not being a new grant but a mere order for a new possession under an old grant, it is worthy of note that there was no attempt by any Governor to make a grant until March 14, 1838, when Governor Armijo attempted to make a grant to Jose Sutton. It is also worthy of note that the most of the grants made by Armijo were grossly in excess of the limit fixed by the colonization law of 1824. Either he was a great official who was not limited by the ordinary laws of the land or he was clearly a usurper of powers which did not belong to him, and if he exceeded his powers as to the quantity of land which should be granted, it is quite as likely that he assumed a power which did not belong to him when he undertook to make any grants at all. It is strange that he alone of the long list of Governors who held office between 1828 and 1846 should have discovered that the Governor had any such power. There is no official authenticated list in existence of the Governors in New Mexico during that period, but from the evidence in the archives it seems certain that the following named persons held the office during that period, but possibly some may omitted: Manuel Armijo, Jose Antonio Chavez, Santiago Abreu, Francisco Sarracino, Mariano Chavez, Juan Rafael Ortiz, Albino Perez, Pedro Munoz, Juan A. Archuleta, Antonio Sandoval, Mariano Martinez, Jose Chavez, and Juan B. Vigil y Alarid.

It seems reasonably certain that Manuel Armijo first held office from May, 1827, to March, 1829, but the exact dates and duration of his later governorships cannot be stated with certainty.

Attention must be called to the fact that there is no record preserved of proceedings of deputation or assembly during the time between 1837 and 1845.

I cannot say that I have examined every entry in the journals of the territorial deputation and depart-

mental assembly which have been preserved at Santa Fe. This would have taken an amount of time much greater than possibly could be given to this work. I have, however, endeavored to examine all of the papers among the archives in the office of the surveyor-general, bearing date after 1828, which in any way relate to the granting of lands. It is possible that some may have been overlooked, but they must be very few, if any. I do not mean to be understood by this that all such papers are referred to or set out in this brief, as many of them appeared to be of no importance. Nothing has been found to militate against the position of the appellant, which is that for nearly eighteen years after the promulgation of the regulations of 1828, no governor of New Mexico, except Manual Armijo, attempted to make grants, and the uniform course of proceeding was for the deputation or assembly to make donations of lands.

In addition to this statement of the general condition of affairs, attention must be called to a number of particular things which appear from the archives and records, as follows:

1. We have the declaration by a committee of the deputation, contained in Archive 812, that there was no doubt that it was within the power of the deputation to grant land.

2. We have the continued acquiescence of governors in the exercise of the granting power by the deputation or assembly as shown in Archives 901, 918, 921, 1309, and 1322, and as shown also by the fact that the governor was ex-officio president of the deputation and assembly.

3. We have the distinct assertion by the governor, through the Secretary of the government, Guadalupe Miranda, as shown in Archive 801, that the

granting or refusing of lands for cultivation belonged to the departmental assemb y.

4. We have the opinion, given in 1832, of a person learned in the law, that this power was exclusively vested in the territorial deputation

5. We have a clear acknowledgment by the Governor in 1834 of the power of the deputation in the case of the Tajique grant.

6. In 1832, in the matter of the Tierra Amarilla grant, the governor acknowledges the authority of the deputation, and the same may be said as to the San Pedro grant, the Canon del Agua grant, and the Gotera grant.

7. Only one governor ever assumed this power, and he so clearly exceeded his authority in other directions as to cast doubt upon all of his acts, and, moreover, it does not appear that even he ever attempted to make any grant until seven years after the making of the grant now under consideration.

It must not be forgotten that it is a matter of general history of New Mexico that the Mexican archives and records have been, in large part, destroyed under both the former and the present governments.

In the Vigil case, so far as can be ascertained from the report sent to Congress, or from the opinion of this court, it does not appear that attention was ever called to the grant as made by the departmental assembly. From the entry in the journal of the assembly, it appears that but a small amount of land was really granted. The grantees were given land to open wells and what they could cultivate, and this land was to be somewhere within the out-boundaries mentioned, and no right to the pastures was given. Upon this modest concession the grantees founded a claim to the

absolute ownership of two million acres. Clearly the departmental assembly never intended anything of the kind, but did intend that there should be actual settlement upon, and cultivation of, some of the land and the establishment of wells upon a stretch of country the very name of which indicated its mortiferous character, due entirely to the lack of water, as Vigil and his associates set out in their petition. Had they actually opened their wells, at which, as they ingenuously say in their petition, travelers could obtain water "*a muy poca costa*," they would have had a fortune in the wells alone, and undoubtedly the assembly had this in view. The land given, to the extent that the grantees could cultivate, with no right to the grazing land, would obviously be small in quantity. In a country where agriculture could be carried on only by irrigation, and in a waterless region like the *jornada del muerto*, the proposed wells were expected to furnish water for the cultivation intended; and no one could have contemplated more than a comparatively insignificant amount of irrigation by water supplied from wells.

Somewhat more than twenty years later, Jack Martin actually did what Vigil and his co-grantees proposed to do, and "Martin's Wells" were as well known to the whole southwest as any place or natural object between Kansas and California, while Martin acquired a fortune by furnishing water to travelers "*a muy poca costa*."

Had the actual decree of the assembly been presented to the courts, and attention called to the long-continued and almost uniform exercise of the granting power by the assembly, it is probable, to say the least, that the opinion in the Vigil case, would have been different in some particulars, although the claim might not have been allowed. The grant was made for a promised consideration moving from the grantees to the public, and that consideration was not only never received, but no attempt was ever made at any

time by the grantees to perform their part of the contract. No injustice was done them by the decision of this court, even if the doctrine now urged, in the present case, is the correct one.

The record in the present case shows continuous possession, cultivation and costly improvements for a period of sixty years before the organization of the Court of Private Land Claims. Every consideration of natural justice and equity seems to require the acknowledgement and confirmation of this claim if the court can possibly find any authority in law to take that course.

F. W. CLANCY,
Counsel for Appellant.